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U.S. Citizenship and Immigration Services

B 5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 11 2005

SRC 03 212 50040

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

We note that [redacted] of Hispanic American Coalition, Inc., claims to act on the petitioner's behalf. The record, however, contains no Form G-28, Notice of Entry of Appearance as Attorney or Representative. Furthermore, [redacted] has not established that she is a licensed attorney or an accredited representative authorized to undertake representations on the petitioner's behalf. *See* 8 C.F.R. § 292.1. Accordingly, we shall consider the petitioner to be self-represented in this proceeding.

We note, further, that part 4 of the I-140 petition form asks: "Has any immigrant visa petition ever been filed by or on behalf of this person?" The petitioner answered "No" to this question. The petitioner, however, knew (or had very good reason to know) that this answer is incorrect. The record shows that this same petitioner had previously filed an immigrant visa petition on the beneficiary's behalf, seeking the same classification, on April 16, 2001. The receipt number of the earlier petition is SRC 01 153 58200. That petition was denied due to abandonment on August 7, 2002, and the petitioner did not contest that denial. The same individual, [redacted] signed both petition forms.

The petitioner is a martial arts instruction school. It seeks to employ the beneficiary permanently in the United States as a 3rd degree black belt instructor trainee pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that the beneficiary qualifies for the classification sought.

On appeal, the petitioner submits additional evidence and requests that the petition be considered under a lesser classification.

Part 2 of the Form I-140, "Petition type," offers the petitioner seven options. The petitioner checked box "d," for "A member of the professions holding an advanced degree or an alien of exceptional ability." Box "e," which the petitioner did not check, is for "A skilled worker (requiring at least two years of specialized training or experience) or professional."

8 C.F.R. § 204.5(k)(4)(1) indicates that, if the petition is accompanied by an individual labor certification, then the job offer portion of the labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

8 C.F.R. § 204.5(k)(2) offers the following definitions of relevant terms:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
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> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

Profession means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

8 C.F.R. § 204.5(k)(3) specifies the evidence required to establish eligibility:

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

(ii) To show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

(iii) If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

The job offer portion of the Form ETA 750 labor certification indicates that the position requires a high school education, one year of 3rd degree black belt training, and one year of experience in the job offered. The labor certification further specifies that the candidate "[m]ust be a 3rd Degree Black Belt through the American Taekwondo Association."

Because the position requires no college education (let alone an advanced degree or its defined equivalent), the position does not qualify as "professional" under the pertinent regulations. The job offer, as described on the labor certification, does not require a member of the professions holding an advanced degree or the equivalent and therefore the petition cannot be approved under that classification.

On November 10, 2003, the director issued a request for initial evidence. The director noted the educational requirements on the labor certification, and gave the petitioner two options. The petitioner could either demonstrate that the beneficiary qualifies as an alien of exceptional ability, or else "change the requested classification to 'Any other Worker' under INA 203(b)(3)(A)(iii)."

Presented with the choice between showing exceptional ability or changing the requested classification, the petitioner did not request a change of classification. Instead, the petitioner submitted, without comment, documents intended to establish that the beneficiary qualifies as an alien of exceptional ability. The documents include several certificates, showing that the beneficiary is a qualified martial arts instructor and has completed various training courses. A number of certificates are in Spanish, and the petitioner did not submit complete, certified translations as required by 8 C.F.R. § 103.2(b)(3).

The director denied the petition, stating "the documentation submitted does not establish exceptional ability." The director added that the petitioner had been offered the opportunity to change the classification sought, but had declined to do so. The denial notice concluded with an erroneous reference to the petitioner's ability to pay the beneficiary's proffered salary. While this passage was included in error, we do not find this error to have influenced the outcome of the decision. From the wording of the rest of the decision, it is clear that the denial rested on the issue of eligibility for the classification sought, rather than the petitioner's ability to pay.

In denying the petition, the director stated that the burden of proof was on the petitioner, and cited section 291 of the Act, 8 U.S.C. § 1361. On appeal, the petitioner submits a copy of the statutory language, with the handwritten annotation: "Is this Section relevant to this case?" There exists ample case law to support the finding that, in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

On appeal, the petitioner states: "I request the opportunity to amend form I-140 . . . to item e." There is no provision in the statute or regulations to permit (absent gross error by the director) a change in classification after the petition has been denied. The petition has already been fully adjudicated, and if the petitioner desires a second full adjudication, then the proper course of action is for the petitioner to file a new petition with the required fee and all necessary evidence. The approved labor certification remains valid for use in another petition in this way. While not required to do so, the director, as a courtesy, offered the petitioner the chance to request a change of classification *before* the denial; the petitioner did not take advantage of the opportunity. By submitting the aforementioned certificates, the petitioner in effect requested adjudication under the "exceptional ability" classification. We note that, even on appeal, the petitioner submits further certificates. Thus, the petitioner continues to defend the claim of exceptional ability, even as the petitioner simultaneously requests a change of classification. We cannot and will not consent to parallel adjudications in this manner, arising from a single petition. It is up to the petitioner to specify the classification sought; the director is not obliged to repeatedly adjudicate the same petition in descending order of classifications until approval is possible.

Because the petitioner did not timely avail itself of the opportunity to change the requested classification when it was still possible to do so, we shall limit consideration to the originally requested classification of alien of exceptional ability.

An unsigned "Briefing" submitted on appeal offers this summary of the beneficiary's career:

> Alien entered Martial Arts in 1986 when he was only 6 years old.
> Alien has consistently developed an expertise in Martial Arts.
>
> Achievements:
>
> [redacted]
>
> Community Services:
>
> Alien has and continues to adjust to the American way of life and contributes in the involvement of many community services activities.

The petitioner submits documents to substantiate the beneficiary's certification and credentials. The petitioner also submits articles from local newspapers, discussing his work with disabled students. The beneficiary received "Certificates of Appreciation" from Progress Energy and "[t]he students, faculty, and staff of Citrus Park Elementary School" in recognition of the beneficiary's participation in "The Great American Teach-In." It appears that the petitioner submitted these documents to satisfy 8 C.F.R. § 204.5(k)(3)(ii)(F), evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. The certificates acknowledge the beneficiary's participation in an educational activity, but this participation does not appear to be inherently an achievement or significant contribution to the field of martial arts; and it is not clear that an energy company and an elementary school are in a position to formally recognize contributions to the field of martial arts.

The assertion that the beneficiary has practiced martial arts since 1986 may be intended to satisfy the experience requirement at 8 C.F.R. § 204.5(h)(3)(ii)(B), but the beneficiary cannot satisfy this requirement simply because he has practiced martial arts since childhood. The plain wording of the regulation demands evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought. A six-year-old child learning martial arts is not accumulating full-time employment experience in an occupation.

The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor shall be the date the request for certification was accepted for processing by any office within the employment service system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the Department of Labor accepted the application for labor certification on April 9, 2001. The petitioner has not produced evidence showing that, as of April 9, 2001 (when the beneficiary was 20 years old), the beneficiary had been employed full-time as a martial arts instructor for at least ten years (i.e., since he was no older than ten years of age).

The beneficiary possesses black belt certification, which arguably addresses 8 C.F.R. § 204.5(k)(3)(ii)(C), but this is only one criterion. The petitioner has submitted no persuasive evidence to address any other criteria.

The petitioner also submits a certificate showing that the beneficiary earned his 4th degree black belt on June 26, 2004. This certification took place over three years after the priority date of April 9, 2001. A petitioner must establish eligibility as of the priority date; a petition cannot be approved at a future date based on subsequent developments. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

Based on the above, we concur with the director's finding that the petitioner has not shown the beneficiary to qualify as an alien of exceptional ability. Furthermore, we note that, pursuant to 8 C.F.R. § 204.5(k)(4)(i), it is not sufficient to show that the beneficiary is an alien of exceptional ability. In addition, the job offer portion of the labor certification must show that the position requires exceptional ability (i.e., traits meeting at least three of the six standards listed at 8 C.F.R. § 204.5(k)(3)(ii)). Here, the labor certification requires, at most, one of these standards (that being certification). Thus, the position offered to the beneficiary requires neither an advanced degree nor exceptional ability.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. This denial is without prejudice to the filing of a new petition, seeking a more appropriate classification, accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.